SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-7124

REVEREND GENE BRIDGES, *et al.*,

Petitioners,

—v.—

ADMIRAL D. C. DAVIS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 18, 1971, affirming a decision of the United States District Court for the District of Hawaii which had denied petitioner's motion for injunctive relief.

Opinions Below

The opinions of the United States Court of Appeals affirming the judgment of the District Court and denying petitioners' petition for a rehearing *en banc* are reported at 443 F.2d 970 (Judge Koelsch concurring and dissenting) and 445 F.2d 1401, respectively, and are set out in the Appendix, *infra,* pp. 1a-11a. The opinion of the District Court is reported at 311 F. Supp. 935, and is set out in the Appendix, *infra,* pp. 14a-25a.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 18, 1971, and the petition for a rehearing *en banc* was denied on August 27, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether an order barring civilian clergymen from giving religious counsel to military prisoners at their request violates the First Amendment in the absence of evidence of a clear and present danger to military prison discipline?

Statutes and Regulations Involved

Title 10, United States Code, Section 5031(c) provides in pertinent part as follows:

> §5031. *Secretary of the Navy: Responsibilities.*
>
> (c) The Secretary of the Navy has custody and charge of all . . . property of the Department [of the Navy].

Title 5, United States Code, Section 301 provides in pertinent part as follows:

> §301. *Departmental Regulations.*
>
> The head of a . . . military department may prescribe regulations for the government of his department, . . . and the custody, use, and preservation of its . . . property.

Section 0702A, Navy Regulations, provides in pertinent part as follows:

> 0702A. *Commanders' Duties of Example and Correction.*
>
> All commanding officers . . . in authority in the naval service are required . . . to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

Section 0704.1, Navy Regulations, provides as follows:

> 0704. *Effectiveness for Service.*
>
> The commanding officer shall:
>
> 1. Exert every effort to maintain his command in a state of maximum effectiveness for war service consistent with the degree of readiness prescribed by proper authority.

Section 0709.1, Navy Regulations, provides as follows:

> 0709. *Welfare of Personnel.*
>
> The commanding officer shall:
>
> 1. Use all proper means to promote the morale, and to preserve the moral and spiritual well-being of the personnel under his command.

Statement of the Case

The petitioners, two clergymen and seven servicemen confined in the brig at the Pearl Harbor Naval Correctional Facility at Pearl Harbor Naval Station [hereinafter, "the base"] brought this suit for injunctive relief against the enforcement of military orders barring the ministers from the base.[1] The suit challenged the validity of the bar orders on the ground that they constituted a denial of petitioners' First Amendment freedoms of speech and religion, the servicemen having expressly requested religious counsel from the petitioning clergymen. The events out of which the lawsuit arose are as follows:

In August 1969 the congregations of two Honolulu churches voted to open their doors to servicemen who had temporarily absented themselves without leave from their military units. As the minister of one of the two churches, petitioner Bridges frequently talked with servicemen, including the other petitioners, who had come to his church. Contrary to the assertion of the court below [App., *infra*, p. 4a], however, he was not responsible for the decision of his congregation to offer sanctuary[2] [R. II, 141, 202,

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[1] A third clergyman, Robert Warner, originally joined the suit as a plaintiff in the District Court and as an appellant in the Court of Appeals. His appeal was abandoned as moot, however, in appellants' petition to the Ninth Circuit for a rehearing *en banc*, because he was then a fugitive under Federal indictment.

[2] Reverend Bridges testified under cross-examination that the Unitarian Church, to which his congregation belongs, "has a national policy urging our churches to offer their premises for symbolic sanctuary. . . . The congregation offers those premises, and there's no way in which any minister is involved in offering that because that's by vote of the congregation" [R. II, 202, 209]. There is not a scintilla of evidence in the record to impeach this testimony.

210],[3] nor did he counsel servicemen to seek sanctuary or remain absent without leave [R. II, 204-05; R. III, 45, 60, 87, 119-20]. Petitioner Jones had no official connection with either church [R. III, 237], although he was one of approximately fifteen civilian ministers in Honolulu who visited the churches occasionally during the month of August to offer religious counsel to the servicemen who were there [R. II, 255-57; R. III, 45, 88-89, 152]. As in the case of Bridges, there is not the slightest evidence that Jones counselled or encouraged any serviceman to become or remain absent without leave.[4]

On September 12, military authorities entered the church premises and arrested those servicemen who remained there [R. II, 143, 222]. Among those arrested were petitioners, all of whom had designated Reverends Bridges, Jones or Warner as civilian ministers from whom they wished to receive religious counsel in the event that they were confined on the base following their arrests [R. II,

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[3] "R." references refer to the volume and page numbers of the transcript of trial.

[4] Notwithstanding the complete absence of such evidence in the record, the majority opinion in the court below implies that both clergymen were violating Federal law by "harbor[ing], conceal-[ing], protect[ing], or assist[ing]" persons known to be military deserters who did not intend to return to their base [App., *infra*, p. 3a]. This implication is unwarranted on at least two grounds: (1) there is no evidence that any of the servicemen intended to desert or that the clergymen knew of any such intention, while there is evidence that the servicemen did *not* intend to desert since they surrendered voluntarily to military authorities [R. III, 143]; and (2) the sanctuaries were neither concealed nor clandestine, received widespread publicity, and were regularly visited by military chaplains as well as civilian clergymen [R. II, 255-57; R. III, 152]. Furthermore, there is evidence that both ministers warned several of the petitioning servicemen about the consequences of their acts and constantly advised the military authorities of their whereabouts [R. III, 43-44, 60, 87, 151-52].

141-43; R. III, 178, 239; Exs. P-7, P-8, P-9]. Since it is general policy to grant requests by Pearl Harbor brig prisoners to see the civilian clergymen of their choice [Exs. P-2, P-6], Reverend Jones visited some prisoners including several of the petitioners in the brig on September 13 [R. III, 186-88] and Reverend Bridges did likewise on September 21 [R. II, 144]. There were no untoward incidents during or as a result of these visits, and no complaints were lodged against either of the ministers [R. II, 322-24].

On September 22, Chaplain John Markley, coordinator of military chaplains for the 14th Naval District, visited petitioner Bridges to discuss certain aspects of a service for prisoners conducted by Reverend Warner in the base chapel on September 15 which had not been well received by the military authorities, and to consider methods of establishing a regular schedule for visits to the prisoners by the three requested civilian clergymen [R. II, 71, 179]. Markley informed Bridges that Admiral Davis, the commanding officer of the base, had disapproved of Warner's informal attire and his use of wine and cake in the September 15 service [R. II, 178-80]. Bridges discussed the "theology of 'cake Communion'" with the chaplain so that the latter could "make recommendations" to Admiral Davis [R. II, 180]. Since his "impression was somehow the Navy had decided I was the responsible member of the three ministers," he assumed a "coordinating role" and offered to set up a schedule of weekly services "in accordance with Unitarian belief and practice" for those prisoners who wished to participate [R. II, 179-80; Exs. P-3, P-4]. This offer was accepted and the schedule drawn up on September 24 in a letter to Bridges from the commanding officer's Chief of Staff [Ex. P-5].

On September 25 Reverend Bridges performed a scheduled service for prisoners, including several of the petitioners, in the base chapel. The service consisted of two parts: (1) a sermon about popular music and the desire for honesty among young people which was delivered from notes used by Bridges in a sermon given to his civilian congregation on February 25, 1968 [Ex. P-1];[5] and (2) an informal discussion about drugs similar to discussions that had occurred between prisoners and the military chaplain in the brig [R. II, 109]. Thereafter the prisoners returned quietly to the brig in the custody of their guards, who testified that no disciplinary or other problems resulted from the service [R. II, 129].[6]

The following day Admiral Davis issued his order barring Bridges, Jones and Warner from the base, under the purported authority delegated to him by Navy Regulations 0702A, 0704.1 and 0709.1[7] [Ex. P-2]. In response to an inquiry from Congresswoman Mink about the grounds for the bar order, the commanding officer stated on October 4 that he considered "the tenor of Mr. Bridges 'religious ser-

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[5] In a statement concerning the September 25 service, in evidence as Ex. P-1, Bridges pointed out that he had made one minor change in the text: "[i]n the edited version, I deleted my earlier reference to Donovan's 'Universal Soldier' because I did not want to offend the military authorities."

[6] The majority opinion in the court below states that the day after Bridges' service, "a marine reacted to reports of the service by assaulting one of the participants" [App., *infra*, p. 5a]. Nothing in the record supports this assertion. Admiral Davis testified merely that a Marine had "socked" one of the prisoners who had attended the service [R. II, 310], but nothing in the Admiral's testimony or elsewhere in the record indicates that the assault was a reaction to the service.

[7] The purported basis for the Admiral's order was stated for the first time in the government's motion papers in the District Court.

vice' offensive to our Naval community" [Ex. P-6]. In substantiating this statement he referred (1) to Bridges' "casual smoking within the sanctuary," a common practice in the Unitarian church during the informal part of a service and a practice which Bridges had not been told was prohibited in the base chapel [R. II, 101-02, 115, 121; R. III, 72], and (2) to "profanities and vulgarities" in the sermon, an apparent reference to Bridges' quotation of a line from a song containing one four letter word.[8] These two incidents seen in the light of the ministers' sanctuary activities off the base apparently formed the entire basis for Admiral Davis' conclusion that the ministers were a "disruptive influence" who should be barred from giving religious counsel to servicemen, since in his view, "[t]he U.S. Navy's ability to properly serve the religious rights of any member of our service is not dependent on the personal contribution of any single individual . . . " [Ex. P-6].[9]

The testimony of military personnel who observed the Bridges service and had custody of the prisoners does not square with the Admiral's conclusion. Corporal Jimmie Hoggatt, a military guard at the service, and Chief Max

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[8] A passage from the sermon [Ex. P-1] reads as follows:

> 'Sock It To Me Baby' by Mitch Ryder actually uses the word 'fuck', although I understand a second version exists which replaces the four-letter Anglo-Saxon term by something which is clearly something else and yet fully suggestive of the banned word.
>
> One does not have to approve of such explicitness to recognize that the kids have had enough of the hypocritical learning in which everybody knows but nobody actually says.

This passage was delivered verbatim by Bridges to his civilian congregation in the February 28, 1968 sermon.

[9] The petitioning servicemen, however, testified that they had no interest in receiving counsel from the military chaplains, none of whom was Unitarian, and desired the counsel and service only of Bridges, Jones and Warner [R. III, 20, 53, 77, 94, 128, 148, 160].

Sherley, a correctional counsellor who also attended, both testified that no disturbances or disorders occurred during or following the service [R. II, 129; Exs. D-1, D-2].[10] They also testified that Bridges delivered his sermon from a text [R. II, 101, 114]; that he quoted only one four letter word from a song [R. II, 114, 123]; that a conversation about drugs took place which was similar to drug counselling sessions held in the brig [R. II, 108, 118]; and that they did not inform Bridges that smoking was prohibited and that he did not smoke until being offered an ashtray by the chaplain's assistant [R. II, 102, 110, 115]. Chief Sherley testified that his only objection to the service was that it should have been held in the brig not in the chapel, and that Bridges in fact had agreed to conduct his next service in the brig [R. II, 116-17]. Chaplain Markley, who had escorted Bridges into the chapel before the service, testified that he had told Bridges that "the Navy does not in any way hinder; you may conduct the service in keeping with your religious tenets" [R. II, 89]; that he knew of no events that were detrimental to discipline and order resulting from Bridges' use of the word, "fuck" [R. II, 96]; and that he had been opposed to barring the ministers from the base, on the ground that freedom of religion was involved [R. II, 78].

Admiral Davis testified that his decision to bar Reverend Jones was based solely on his relationship to Bridges[11]

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[10] The only evidence of any disciplinary action taken against one of the petitioning servicemen occurred after the bar order had been issued, when petitioner Trendell circulated a petition among his fellow prisoners requesting that Unitarian services continue on a regular basis. The brig officer confiscated the petition, stating, "I will not have this shit going on in my brig," and placed Trendell in solitary confinement for six weeks [R. III, 94-99].

[11] In his letter of September 22 to Admiral Davis proposing a coordinated schedule of Unitarian services, Bridges stated that

and his sanctuary activities off the base [R. II, 322-24; R. III, 288]. The Admiral testified that Jones did not misbehave or commit any offensive act during either of his counselling visits to prisoners [R. II, 322-24]. On the basis of this testimony, the majority in the court below conceded that the evidence sustaining the bar against Jones was "somewhat thin" [App., *infra*, p. 7a], while Judge Koelsch would have reversed the judgment against him [App., *infra*, p. 8a].

Following hearings on the petitioners' motions for a temporary restraining order and a preliminary and permanent injunction against the enforcement of the orders, the District Court denied relief and held that the orders were non-reviewable, stating that the result would have been no different had it ruled on the merits [App., *infra*, p. 23a]. By a court divided with regard to petitioner Jones, the Court of Appeals affirmed the denial of injunctive relief on the merits, while holding that "in a strict sense, the orders before us are not non-reviewable" [App., *infra*, p. 7a]

"[t]he services would either be conducted by me (probably a majority of the time), or directly authorized by me and under my supervision. The Reverends Larry Jones and Robert Warner have agreed to work with me in this manner, should their assistance be needed because of my parish commitments" [Ex. P-3].

Reasons for Granting the Writ

1. *The Court should define the proper scope of the rule in* Cafeteria & Restaurant Workers v. McElroy.

In upholding the validity of the bar order the District Court and the Court of Appeals below relied entirely on *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961), on the ground that there this Court "[made] it clear that access to a military reservation is a matter within the sound discretion of the commander of the post" [App., *infra*, p. 8a].

Cafeteria Workers, however, involved no First Amendment question and offers little guidance to a court weighing a challenge to a military bar order on the basis of freedom of speech and religion. As a result there is general confusion and disarray among the Circuits with regard to standards for judging military orders barring civilians engaged in First Amendment activity from military premises. Compare *Kiiskila* v. *Nichols*, 433 F.2d 745 (7th Cir. 1970) (*en banc*) and *United States* v. *Bradley*, 418 F.2d 688 (4th Cir. 1969) with *United States* v. *Flower*, Slip Op. No. 31143 (5th Cir. Nov. 8, 1971) and *Weissman* v. *United States*, 387 F.2d 271 (10th Cir. 1967).

This confusion, which indicates that the scope of *Cafeteria Workers* is hardly "clear", is heightened by the decision below. The conflict between the result reached by the Ninth Circuit majority and other First Amendment decisions which have been rendered in the shadow of *Cafeteria Workers* is most acutely demonstrated by *Kiiskila* v. *Nichols*, *supra*, where the Seventh Circuit sitting *en banc* unanimously reversed a summary judgment entered against

a civilian employee who had been barred from an Army base for distributing antiwar literature and talking to an officer on another base about an antiwar rally. In ordering the readmission of the civilian to the base, the court held that "unless we are to permit the deprivation of constitutional rights through subterfuge, the validity of a commanding officer's exclusion of a civilian employee must turn upon more than his own subjective statements of the the reason for his action" 433 F.2d, at 751. Since Admiral Davis' conclusion that the petitioners' religious activities were "disruptive" rested on little more than his own assertions, and, as Judge Koelsch pointed out in his concurring and dissenting opinion, on "hearsay, surmise and conclusory statements completely bereft of factual predicates" [App., *infra,* p. 8a], it is difficult to imagine that the Seventh and Ninth Circuits would have reached the same result in the case at bar.[12]

While there is no doubt that this Court has recognized the authority of the military summarily to exclude civilians

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[12] The opinion below denying the petition for a rehearing [App., *infra,* pp. 10a-11a] attempts to distinguish *Kiiskila* from the facts of this case, but each distinction is either spurious or unsupported by the record: (1) "[t]here . . . the court recognized that off the base conduct could be considered in determining the validity of the exclusion order," but it held that anti-war activity was precisely the kind of conduct that could *not* be considered and presumably would have held that religious counselling was equally protected; (2) "[t]here, the conduct did not involve 'proscribed on-the-base activity,'" nor did it in the case at bar unless one is to construe as "proscribed" those aspects of Bridges' September 25th service which Admiral Davis found "offensive"; and (3) "[t]here, the court emphasized the fact that appellant was on the base as a civilian employee," a status which made the facts in *Kiiskila* closer than the facts in the case at bar to those in *Cafeteria Workers.*

from premises under its direct control, *Cafeteria & Restaurant Workers* v. *McElroy*, *supra*, such authority does not extend to cases where the announced grounds for exclusion are "arbitrary or discriminatory." *Id.*, at 898. Both the majority and the dissenting opinions in *Cafeteria Workers* imply that the scope of a court's inquiry into whether the exclusion of a civilian engaged in constitutionally protected activity was arbitrary or discriminatory must be broader than the Ninth Circuit would allow. Justice Brennan in dissent, for example, explained the majority's statement that the petitioner "could not have been kept out because she was a Democrat or a Methodist," 367 U.S. at 898, by pointing out that "if petitioner['s] . . . [security] badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether 'liberty' or 'property' it is unnecessary to state—had been injured." *Id.*, at 900.[13]

Since this Court has had no occasion to explain and refine the dicta in *Cafeteria Workers* concerning the review of a

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[13] "In analyzing the Court's opinion in *Cafeteria Workers*, its own description of the security aspects surrounding the Naval Gun Factory [from which the plaintiff was excluded after she was denied a security clearance] should be kept in mind:

> 'The Gun Factory was *engaged in designing, producing, and inspecting naval ordnance, including the development of weapons systems of a highly classified nature*. . . . Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter the premises by the Security Officer, a naval officer subordinate to the Superintendent.' 367 U.S. at 891."

United States v. *Flower*, *supra* at 30-31 (Simpson, J. dissenting). [emphasis supplied]. Not only does the case at bar involve substantial First Amendment questions, but it is completely devoid of any "security aspects."

military bar order when a compelling First Amendment question is involved, the lower courts have been left to their own devices in conducting such review. Acting in this vacuum the majority of appellate courts have held that the authority to exclude does not encompass cases where the conduct in question was generally protected by the First Amendment[14] and did not "promote disruption," *United States* v. *Bradley, supra,* at 691, or was not "directed to inciting or producing imminent lawless conduct," *Kiiskila* v. *Nichols, supra,* at 751, or did not clearly undermine "discipline," *Yahr* v. *Resor,* 431 F.2d 691 (4th Cir. 1970).

Accordingly, the Court should grant the petition for a writ of certiorari in the case at bar to define the scope of the rule in *Cafeteria Workers* and resolve the conflicts in application of that rule among the circuits.

2. The order barring petitioners Bridges and Jones from giving religious counsel to the petitioning military prisoners at their request violates the First Amendment in the absence of evidence that Bridges and Jones are a clear and present danger to military prison discipline.

It is difficult to understand how the majority in the court below could have characterized Admiral Davis' order as a reasonable "[r]egulation as to the *time, place, and manner,*

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[14] Decisions upholding summary exclusion of civilians by a military commander are often based on findings that the constitutional claims advanced were either spurious or nonexistent. See, *e.g., Weissman* v. *United States, supra,* at 273 (10th Cir. 1968) ("At the time of their arrest [the civilians] . . . did not assert a right to enter the reservation because of any representation of the press. We doubt that their belated self-serving declarations entitle them to be heard on that point."); *United States* v. *Jalinski,* 411 F.2d 476, 478 ("[A]ppellant's primary interest in entering the base was the slight economic advantage gained through his use of the military facilities. . . . [T]his was a mere privilege in the first instance.").

of [the exercise of petitioners' freedom of religion]" [App., *infra*, p. 7a] (emphasis supplied). The effect of the order was to deny the petitioning military prisoners, all of whom were adherents to the Unitarian faith [R. III, 42, 54, 84, 121, 128, 148, 172], the right to practice their religion at any time or in any place or manner under the guidance of their own ministers, who, the record indicates, were the only available Unitarian clergymen [R. II, 65-66, 182-83]. Indeed, there is evidence that a request by the petitioning prisoners to continue Unitarian services after the bar order had been given was summarily denied and one prisoner was punished for making the request by the officer in charge of the brig.[15]

A citizen does not forfeit his constitutional rights either when he enters military service, *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Kauffman* v. *Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), or when he is sent to prison, *Younger* v. *Gilmore*, 40 U.S.L.W. 4003 (U.S. November 8, 1971); *Cooper* v. *Pate*, 378 U.S. 546 (1964) (per curiam); *Washington* v. *Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968). His religious freedom, moreover, is a preferred and fundamental right, and "[c]ourts will closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion, especially so where the adherents of one faith are more heavily restricted than the adherents of another," *Cooper* v. *Pate*, 382 F.2d 518, 521 (7th Cir. 1967), *on remand from* 378 U.S. 546 (1964). See also *Pierce* v. *La Vallee*, 293 F.2d 233, 235 (2d Cir. 1961). A crucial aspect of this scrutiny is whether a prisoner has reasonable access to a minister of his faith, *Walker* v. *Blackwell*, 411 F.2d 23, 29 (5th Cir. 1969); moreover, "[s]hould a recognized . . .

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[15] See n. 10 *supra*.

minister make his services available to the prison, . . . and space and normal prison routine permit, those who sincerely believe in [the faith] should be allowed to attend any service he shall conduct." *Cooper* v. *Pate*, 382 F.2d, at 522. See also *Knuckles* v. *Prasse*, 302 F. Supp. 1036, 1057-59 (E.D. Pa. 1969). This right of reasonable access to ministerial services, of course, is reciprocal, since "[t]he priest or preacher is as fully protected in his function as the parishioners are in their worship." *Follett* v. *McCormick*, 321 U.S. 573, 574 (1944).

The grounds asserted by Admiral Davis for abridging the petitioners' exercise of this reciprocal First Amendment right were that the Unitarian services "were offensive to our Naval community" and that the clergymen associated with them were a "disruptive influence." If these assertions are based upon the conduct of the clergymen while on the base they are insufficient to sustain the abridgement.

In addition to the testimonial assertions of Admiral Davis characterized as "gossip and unconfirmed rumor" in the concurring and dissenting opinion of Judge Koelsch [App., *infra*, p. 9a], the testimony of three government eye witnesses that they were personally offended by certain aspects of the Bridges service, including the sermon, cannot justify the bar order. Even in the setting of a prison the exercise of religious freedom "does not involve mere matters of convenience or preference, but rather basic questions of constitutionally protected religious rights." *Knuckles* v. *Prasse*, 302 F. Supp. 1036, 1048 (E.D. Pa. 1969).[16] More-

[16] In *Street* v. *New York*, 394 U.S. 576, 592 (1969), this Court pointed out that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." See also

over, "[t]o call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another." *Fowler* v. *Rhode Island,* 345 U.S. 67, 70 (1953). See also *Founding Church of Scientology* v. *United States,* 409 F.2d 1146 (D.C. Cir. 1969).

Evidence sufficient to sustain the abridgement of First Amendment rights either on a military base, *Kiiskila* v. *Nichols, supra* at 751; *United States* v. *Bradley, supra* at 691; *Yahr* v. *Resor, supra* at 691, or in a penal institution, *Long* v. *Parker,* 390 F.2d 816, 822 (3rd Cir. 1968); *Jackson* v. *Godwin,* 400 F.2d 529, 535, 541 (5th Cir. 1968); *Fortune Society* v. *McGinnis,* 319 F. Supp. 901, 904 (S.D.N.Y. 1970), must show a clear and present danger that the exercise of those rights will result in a breach of institutional discipline or security. With regard to petitioner Bridges[17] no government witness testified that there were any disciplinary or security problems during or resulting from the September 25 service, and Admiral Davis himself testified that he knew of no specific disciplinary incidents but was concerned only with "the impact of the service on the attitude of the people . . . that [sic] observed and viewed the conduct of the ceremony" [R. III, 295].[18]

Bachellar v. *Maryland,* 397 U.S. 564, 567 (1970); cf. *Cox* v. *Louisiana* (I), 379 U.S. 536 (1965); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963).

[17] In his separate opinion Judge Koelsch insisted, "I do not believe that on this record we can attribute to . . . Bridges many of the misdeeds and much of the mischief so forcibly emphasized by the [majority] opinion" [App., *infra,* p. 8a].

[18] The insufficiency of such testimony to support the Admiral's order barring Bridges is dramatically illustrated by a far more

In the case of petitioner Jones, the judgment against whom Judge Koelsch would have reversed, there is virtually no evidence of "offensive" behavior on the base, while there is an admission on the part of Admiral Davis that he was barred solely because of his relationship to Bridges and his antiwar activities off the base. The First Amendment activity of a civilian off a military base certainly cannot sustain an order barring him from the base "unless that conduct directly and imminently foreshadows proscribed on-the-base activity." *Kiiskila* v. *Nichols, supra* at 751. The record is devoid of any such evidence in the case of either clergyman.

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incendiary circumstance in *Long* v. *Parker, supra* at 822, where the Third Circuit held that

> [m]ere antipathy caused by statements derogatory of, and offensive to the white race is not sufficient to justify the suppression of religious literature even in a prison. Nor does the mere speculation that such statements may ignite racial or religious riots in a penal institution warrant their proscription. To justify the prohibition of religious literature, the prison officials must prove that the literature creates a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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November 25, 1971

Attorneys for petitioners gratefully acknowledge the invaluable assistance of John H. F. Shattuck, LL.B., Yale Law School, 1970, in the preparation of the Petition.

Opinion of the United States Court of Appeals
Dated June 18, 1971

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 25317

REVEREND GENE BRIDGES, *et al.*,

Appellants,

v.

ADMIRAL D. C. DAVIS, *et al.*,

Appellees.

REVEREND GENE BRIDGES, *et al.*,

Appellants,

v.

COLONEL D. MCGOUGH, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Before: KOELSCH, CARTER and KILKENNY, Circuit Judges.

PER CURIAM:

This is an appeal by three ordained ministers (Bridges, Jones and Warner) and eight servicemen from a decree

dismissing their actions for injunctions against certain military authorities in Hawaii.

Factual Background

In August, 1969, the Church of the Crossroads and the Unitarian Church in Honolulu became sanctuaries for military servicemen who decided to absent themselves without leave. The appellant ministers were involved in the sanctuaries. The other appellants are servicemen who entered the sanctuaries while absent without leave from the military. After the servicemen were arrested and placed in military prison, the ministers performed services for them on the military base. Subsequently, the appellee commanding officers of Naval and Marine bases in Hawaii barred the ministers from again entering those bases on the ground that their presence would be inimical to morale, discipline and good order of the service.

The facts are practically undisputed. Hawaii is an important American staging area for military activities in the Pacific. There located are the Pearl Harbor Naval Base (Pearl Harbor) and the Marine Corps Air Station, Kaneohe Bay, Hawaii (Kaneohe), each of which contribute significantly to the nation's military effort. Pearl Harbor is under the command of appellee, Rear Admiral D. C. Davis, Commandant of the 14th Naval District, and Kaneohe is under the command of Colonel James D. McGough.

The Naval regulations applicable to officers in command of naval activities direct the commander to exert every effort to maintain his command in a state of maximum effectiveness. They instruct the commanding officer to take all necessary and proper measures to promote and safeguard the morale, the physical well being and the general welfare

of the officers and enlisted men under his command. Appellant servicemen, when in the sanctuaries, were defying the military authorities and could well be classified as deserters. (One who harbors, conceals, protects or assists any deserter, knowing him to have deserted or refuses to give up and deliver such person on the demand of an officer authorized to receive him, violates the law.)[1]

As early as August, 1969, appellant Warner opened the doors of the Church of the Crossroads to servicemen who were AWOL. This was in protest to the war in Vietnam. He was designated as the "spiritual leader" of the Crossroads sanctuary. On that date, the first servicemen entered the sanctuary. Four days later the servicemen and Warner acted as leaders of a group of 350 people who marched under the name of the "Hawaii Resistance". During the course of the march, Warner called on observing servicemen to join the movement, and urged participants to "resist" any attempt by civilian or military authorities to arrest the servicemen who joined the march. Six other servicemen, including two of the appellants, declared themselves AWOL and entered the Crossroads sanctuary immediately following the march. Warner then issued a statement, published in the newspapers, that approximately 20 persons would barricade themselves in the sanctuary and protect the servicemen fugitives from arrest. On August 17, 1969, Warner published an article in a newspaper in which it was stated that the initial servicemen to enter the sanctuary, "openly defied arrest" in the August 10th march, and that the total number of servicemen in the sanctuary had reached 15. The article compared the delightful living conditions and activities in the sanctuary to the drab life in the military. A

[1] 10 U.S.C. § 866, 10 U.S.C. § 885 and 18 U.S.C. § 1381.

short time later, the number of military fugitives in the sanctuary reached 24. On that date, three of the number moved to the First Unitarian Church of Honolulu, whose minister, appellant Bridges, had decided to open the church as a sanctuary. Bridges, who is also an attorney, prepared a document to be signed by those who might be apprehended, which indicated that Bridges, or some other minister whom he might designate, should have immediate and prompt access to them in any place where they might be confined.

In early September, 1969, Armed Service policemen entered the church sanctuaries and arrested 12 fugitives who were AWOL. Eight of those are appellants. Thirteen others escaped.

During all this period, Admiral Davis was receiving intelligence reports, briefings from staff members, watching television reports, and reading the articles in the newspapers. He hesitated to bar the ministers from the base because "... we were trying to be as open-minded as possible and not create a situation if we [could] avoid it." On September 15th, Warner conducted a service for about nine prisoners in the prison brig. Although he knew that the consumption of wine was forbidden, Warner permitted a full bottle of wine to be passed among the prisoners, each of whom drank from it. He also passed out pieces of birthday cake to the prisoners. Certain of his remarks were in derogation of the military.

Immediately following this service, Admiral Davis reached the conclusion that Warner's overall conduct, both on and off the base, was detrimental to the good order and discipline of the service and was prepared to bar him from the base. When Bridges learned of this, he implored the Admiral not to take such action. The Admiral refrained

on the promise of Bridges to accept "certain areas of responsibility". Bridges, by letter, asked that he be permitted to give religious counselling and conduct services for prisoners who listed their religious preference as Unitarian. In this letter, he named appellant Jones as an alternate. Jones is a minister of the United Church of Christ and was actively involved in the Crossroads sanctuary activity. In the letter, Bridges also indicated that Warner and Jones would be acting under his supervision. Bridges was then informed by letter that times would be made available to the three ministers for conducting services and counselling prisoners. The following day, Bridges held a service in the prison chapel for six prisoners. Although he had been informed by the military authorities of their concern with Warner's lack of ministerial attire when on the base, Bridges conducted the service in a short sleeved shirt and trousers. During the course of the sermon, he quoted from a song which used a four letter word. He also lit a cigarette, and permitted the prisoners to do likewise. Smoking is not permitted in the prison chapel.

One of the soldiers who escorted the prisoners to the chapel was so upset by the service that he indicated to commanding officers he would disobey an order to again perform church duties if the services involved these prisoners. The following day another marine reacted to reports of the service by assaulting one of the participants. Many reports reached the Admiral indicating that the service had a disturbing effect on the entire military community. Thereupon, he concluded that the continued presence on the base of the three ministers would have an adverse effect on the morale at the base. It was his belief that the actions of the AWOL servicemen in seeking sanctuary in the ministers' churches and in defying military

authority went to the very heart of discipline and morale. Although he felt there was enough justification to bar the ministers prior to the September 25th affair, he said that the service conducted by Bridges, the designated leader of the group, on that date was "just the last straw". He then issued the order barring the three ministers from the base.

Colonel McGough, the Commanding Officer at Kaneohe Marine Corps Air Station, was fully aware of the activity at the sanctuary but, even so, permitted Warner to visit a prisoner. The Colonel was also aware of the involvement in sanctuary activities of Bridges and Jones. Subsequent to his receipt of reliable information on the chapel incidents of September 15th and 25th and an incident at Pearl Harbor Correctional Center, he concluded to bar the three ministers from the area over which he had jurisdiction. A furtlier discussion of the elaborate evidence presented to the trial judge would add nothing to the validity of our conclusions.

Issues

While appellants assign a variety of reasons for reversal of the judgment of the trial court, we hold that two principal questions are involved: (1) are the orders in question reviewable, and (2) if reviewable, is this court permitted to substitute its judgment for that of the military authorities as to the necessity for the orders in question?

(1) Following the decision in *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), many courts seemed to confuse jurisdiction with scope of review. However, to say that an action is non-reviewable is not the equivalent of saying that the appropriate court lacks jurisdiction to review. Although

the scope of review in cases such as this involving military matters is extremely limited, that does not mean that any military action is beyond the reach of the courts. *Smith* v. *Resor*, 406 F.2d 141, 145 (2d Cir. 1969). Therefore, in a strict sense, the orders before us are not non-reviewable. The phrase non-reviewability is properly ascribed to the scope of review, rather than jurisdiction to review. The *Orloff* case supports this view.

(2) The appellants claim that the orders here under scrutiny violate their freedoms of speech and religion under the First Amendment. Initially, we note that these rights are not absolute. Regulation as to the time, place, and manner of such rights is proper when reasonably related to a valid public interest. *Sellers* v. *Regents of the University of California*, 432 F.2d 493, 499 (9th Cir. 1970), *cert. denied* —— U.S. —— (1971). The record before us leaves no doubt but that the orders in question could be justified in terms of a reasonable regulation of First Amendment activity. While the evidence implicating the appellant Jones may be somewhat thin, we hold it to be sufficient.

Moreover, persons in command of a military post, such as appellees, have wide discretion as to whom they may exclude from their posts. This discretion will be disturbed only upon a showing that the grounds for exclusion were patently arbitrary or discriminatory. *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961). True enough, *Cafeteria Workers* involved a restaurant worker on the base, rather than a minister. However, we can find no valid reason why the logic employed in *Cafeteria Workers* should not be applied to the facts before us. In the totality of circumstances presented by this record, it cannot be said that the actions of appellees, in excluding

appellant ministers from the respective posts, were patently arbitrary or discriminatory. *Cafeteria Workers* makes it clear that access to a military reservation is a matter within the sound discretion of the commander of the post. Any review of this discretion, other than to determine whether the action was patently arbitrary or discriminatory, is precluded by the logic of both *Cafeteria Workers* and *Orloff*.

We are not here concerned with Sixth Amendment rights and express no view as to the result if those rights were involved.

Appellees' motion to dismiss on the ground that the appeals are moot is denied. The judgment of the lower court, in each case, is AFFIRMED.

CONCURRING AND DISSENTING

KOELSCH, Circuit Judge.

I concur in the result with respect to appellants Warner and Bridges, but I cannot join in affirming the judgment against Jones.

And, if substantial proof of actual misconduct was a necessary predicate for the post commanders' orders summarily barring Warner and Bridges from the military bases, then I would wholly disagree with my brothers. Unlike them, I do not believe that on this record we can attribute to Warner and Bridges many of the misdeeds and much of the mischief so forcibly emphasized by the opinion. The "proof" on that score consisted largely of hearsay, surmise and conclusory statements completely bereft of factual predicates.

But, as I read *Cafeteria Workers*, [*Cafeteria and Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961)] judicial

interference with a military commander's orders involving the exercise of discretion is largely confined to those rare instances where such orders are utterly incapable of being rationalized on any conceivably valid basis. The orders in the instant case, even though the result of gossip and unconfirmed rumor and although they extend to "men of the cloth" are not, in my opinion, within that category.

M. Oliver Koelsch
United States Circuit Judge

Opinion of the United States Court of Appeals
Dated August 27, 1971

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 25317

REVEREND GENE BRIDGES, *et al.*,

Appellants,

v.

ADMIRAL D. C. DAVIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

On Petition for Rehearing and Suggestion for Rehearing in Banc

Before:

KOELSCH, CARTER and KILKENNY,
Circuit Judges.

Relying for the most part upon *Kiiskila* v. *Nichols*, 433 F.2d 745 (7th Cir. 1970), appellants suggest that we rehear the case in banc. *Kiiskila* is manifestly distinguishable. There, for example, the court recognized that off the base

conduct could be considered in determining the validity of an exclusion order. P. 751. There, the court emphasized the fact that appellant was on the base as a civilian employee. Here, appellants had no such status. There, the conduct did not involve "proscribed on-the-base activity". P. 751. Here, some of appellants' activities were directly in violation of on-the-base directives. There, the activity involved a peaceful and legitimate attempt to express views critical of the Vietnam War and the Government. Here, appellants were active participants in organizing a sanctuary which resulted in at least twenty-five members of the Armed Forces going AWOL.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

The above order was circulated to each member of the court. No member requested an in banc hearing within the time required by General Order 15.

Judge Koelsch joins in the result, not in the substance of the order.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25317

DC #3078 & 3079—Civ

REVEREND GENE BRIDGES, *et al.*,

Appellants,

v.

ADMIRAL D. C. DAVIS, *et al.*,

Appellees.

REVEREND GENE BRIDGES, *et al.*,

Appellants,

v.

COLONEL D. McGOUGH, *et al.*;

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said

District Court in this Cause be, and hereby is affirmed. Appellees' motion to dismiss on the ground that the appeals are moot is denied.

A TRUE COPY

ATTEST: SEP 23 1971

/s/

WM. B. LUCK, *Clerk*
by EMIL E. MELFI, *Deputy*

Filed and entered June 18, 1971

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

Civ. Nos. 3078, 3079

REVEREND GENE BRIDGES *et al.*,

Plaintiffs,

v.

ADMIRAL D. C. DAVIS *et al.*,

Defendants.

REVEREND GENE BRIDGES *et al.*,

Plaintiffs,

v.

COLONEL D. McGOUGH *et al.*,

Defendants.

Nov. 26, 1969

JOHN S. EDMUNDS, Honolulu, Hawaii, The American Civil Liberties Union of Hawaii and the American Civil Liberties Union, *for plaintiffs;* Brook Hart, Honolulu, Hawaii, of counsel.

ROBERT K. FUKUDA, U. S. Atty., District of Hawaii, *for defendants.*

DECISION AND ORDER OF DISMISSAL

TAVARES, *District Judge.*

If this Court were not in the middle of trying a long jury case, it would love to have about three weeks to get all the decisions together and write a very learned, or try to write a learned, decision on this subject. However, the subject does call for an early decision and the Court has spent every effort toward that and, therefore, the Court will have to make a decision orally in order to expedite the matter.

In the situation presented by the three cases originally before the Court, namely, Civil Nos. 3078, 3079 and 3080, three ordained ministers, Bridges, Jones and Warner, all of Honolulu, allege that military authorities have barred them from military installations in the Honolulu area, thereby depriving them of rights allegedly guaranteed under the Civil Rights Act of 1871, 42 U.S. Code §1983, together with those under the First and Fifth Amendments to the Constitution of the United States. The claim under Section 1983, however, has been withdrawn by plaintiffs.

Other plaintiffs, being military prisoners who joined with the three ministers in two of the three actions; are mentioned later.

For simplicity the cases will henceforth be designated as follows: No. 3078, Navy; No. 3079, Marine, No. 3080, Army.

The complaint in the Navy case was accompanied by a Motion for a Temporary Restraining Order and for Preliminary Injunction. In the Navy case, the three minister plaintiffs were joined by others, being enlisted men of the Navy, under confinement at the Naval Correction Facility, U. S. Naval Station, Pearl Harbor, which is here on Oahu in the State of Hawaii, "having been confined," according

to the language of the complaint, "for allegedly being absent without official leave from military duty and being present during said leave at the Church of the Crossroads in Honolulu." (Complaint, First Cause of Action, Count I, paragraph 3.)

It is clear that plaintiffs intended to assert that they had been at the Crossroads sanctuary for anti-Vietnam war adherents during their respective periods of *absence* rather than, as was stated in the complaint, during said "leave," because, as I take it, there was no official leave.

The Complaint in the Marine case was likewise accompanied by a request for a Temporary Restraining Order and Preliminary Injunction. In the Marine case, the three minister plaintiffs were joined by one enlisted man of the Marine Corps "currently confined to the Correctional Facility at the Kaneohe Marine Corps Air Station. * * * Prior to being so confined, Plaintiff had been absent from his military duties and had been at the Church of the Crossroads in Honolulu, Hawaii from approximately September 6, 1969 until September 11, 1969." (Complaint, First Cause of Action, Count I, paragraph 3.)

The Complaint in the Army case did not seek a Temporary Restraining Order although a Preliminary Injunction was sought. It would appear that at the time of filing this particular complaint none of the followers of the three plaintiffs were incarcerated and none joined as parties plaintiff. The Complaint does set forth, however, in paragraph 6, "That prior to approximately October 5, 1969, * * * Plaintiff Warner did in fact visit certain inmates at said Stockade, including confinees Albert King, Bryan Bohannon, Allan Porter and Mitchell Johnson, each of whom was confined for having earlier absented himself from the military service and seeking sanctuary at the Church

of the Crossroads in Honolulu, Hawaii." This was taken from the First Cause of Action, Count I, paragraph 6.

A second count of the first cause of action in each of the three complaints alleges that the defendants wilfully conspired among themselves to perform the acts complained of thereby proximately depriving plaintiffs of their rights. By a Second-Cause-of-Action allegation in each complaint, it is alleged that the defendants named therein wilfully conspired with named defendants of another or other service branch or branches to deprive plaintiffs of their rights.

The thrust of the Complaint in the Navy case regarding the confinee plaintiffs is to the effect that they are being deprived of their freedom to consult with ministers of their own choice while in confinement at the Pearl Harbor Correctional Facility.

The three complaints were filed on November 6, 1969, and that afternoon a brief meeting was held in open court. Thereafter and from approximately 3:30 p.m. until 8:00 p.m. on November 7, 1969, and from 10:00 a.m. to 6:30 p.m. on Saturday, November 8, 1969, plaintiffs and the defendants presented evidence.

At the outset, the named plaintiff, Robert Long, named in the Marine case, stated in open court that he had not requested nor did he desire the services of John S. Edmunds or Brook Hart as attorneys to represent him in this or any action against military authorities and further that he did not wish to be a party plaintiff in the Marine case. After permitting conference by Mr. Long with the attorneys concerned, the Court ordered, without objection—in fact it was with the concurrence of the attorneys—that the name of Robert Long be withdrawn from the pleadings as a named plaintiff.

The Court by this implies no finding or intent to find any unethical conduct on the part of plaintiffs' counsel. I think they have an explanation which covered the situation, as far as this Court is concerned.

There being no prisoners in confinement by the Marine Corps or the Army, plaintiffs' demand for a Temporary Restraining Order against the Marines was abandoned or at least not pressed—I'm not quite sure I remember which. No such action having been sought against the Army, only the demand against the Navy remained.

By stipulation between the parties, it was agreed that plaintiff Bridges might visit Pearl Harbor on Sunday, November 9, 1969, and the plaintiffs thereupon temporarily abstained from pressing their demand for an immediate Temporary Restraining Order against the Navy pending further hearing in the matter. The Court by this statement again does not imply that the prayer for a Temporary Restraining Order was waived by plaintiffs.

In this posture the matter was continued over to Monday, November 17, 1969, the date previously set for hearing on the Orders to Show Cause. The Court ordered consolidation of the cases and the hearings for Preliminary Injunction and Permanent Injunction. The Court further advised the parties that all evidence which had previously been taken and the exhibits which had been received in evidence would be considered to be a part of the record of the hearing to show cause without the necessity of repetition.

The matter came on for further hearing at 10:00 a.m. on November 17, 1969, and with brief recesses for lunch and dinner continued on until 8:30 p.m. On November 17, 1969, and prior to commencement of the hearing to show cause, the Government filed Motions for Dismissal in the cases

against the Marines and against the Army. The Court took these motions under advisement but deferred rulings thereon, pending such further showings as might be made on the show cause hearing.

The Court adjourned until 3:00 p.m., November 18, 1969, because of the commencing of a lengthy jury trial involving out-of-state parties in another matter earlier on the 18th. The Court reconvened at 3:00 p.m. and heard testimony presented by plaintiffs and defendants until 7:45 p.m. on November 18th. The Court reconvened at 1:00 p.m. on November 19, 1969, to receive additional authorities the parties might desire to submit and to settle unresolved procedural problems.

The Court, by stipulation of counsel, set Saturday morning, November 22, 1969, at 9:00 a.m. for such final arguments as the parties might desire to make and as a deadline for the submission of pertinent regulations heretofore requested by the defendants. I presume that those regulations are the ones that they quote in their final memorandum filed on November 21, 1969.

The plaintiffs at each of these hearings subsequent to November 9, according to my recollection, renewed their demand for a Temporary Restraining Order to remain in force until the Court's further decision on the issuance of a preliminary injunction or a permanent injunction. The Court in each instance denied or failed to grant plaintiffs' demand because the Court felt that no sufficient showing had been made to justify the issuance of such order.

The Court spent every spare minute available wading through the tremendously exhaustive citations of authority submitted in support of the contentions espoused by the various parties.

During the period of the Court's search for legal precedents and rationale, the Court did continue with all dispatch possible to permit the plaintiffs and the defendants to present such evidentiary matter as they respectively desired.

On November 18, 1968, by agreement between counsel for all parties, Civil No. 3080, the Army case, was dismissed on the basis of certain understandings stated by such counsel in open court, according to my recollection.

[1] At this juncture, in going through all of this reading, the Court has come to the conclusion that, in this particular case, it must apply the doctrine of non-reviewability in the two remaining cases presented, meaning that, under the circumstances now appearing, this Court has no power to review the military administrative determinations in question—here, the Navy and Marine Corps determinations—which exclude the three civilian ministers from military installations in the vicinity of Honolulu, Hawaii, even though such action may deprive the confinee plaintiffs of the services of the minister-plaintiffs as ministers of their choice.

In this connection, I might point out that, in an address delivered by Chief Justice Warren at the New York University Law Center on February 1, 1962, entitled "The Bill of Rights and the Military," which was one of the very long notes cited by counsel for plaintiffs, 37 New York University Law Review 181 at page 187, written in 1962, the then Chief Justice said, among other things:

> "* * * It is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason

> is that the courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."

I think I might say that this, in my view, applies in this particular case to the military reservation also. The Court, by the way, has also read other notes such as the "Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement" in 55 Virginia Law Review 483, and a very long article in 56 California Law Review 379 entitled "God, the Army, and Judicial Review: the In-Service Conscientious Objector."

Although the Chief Justice was not in sympathy with the majority, he did point out in that New York University Law Review note, that in Cafeteria and Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, 1961, where a short-order cook employed by a concessionaire on a military base was summarily refused further security clearance without hearing, explanation, or opportunity to rebut, the Court reached the constitutional question of the power of Naval authorities to exclude persons from Naval bases, and by a five to four vote, decided the question against the employee.

Chief Justice Warren then continues,

> "I joined Mr. Justice Brennan's dissent, which took the position that the Court, while conceding petitioner's right not to be injured arbitrarily by the Government, in fact made that right nonenforceable by refusing to accord petitioner any procedural protection."

The Court believes that Chief Justice Warren, even though dissenting, expressed accurately the law as the Court determined it to be in 1962, and this Court has failed

to find any compelling decision or reason to hold that the law today as applied to the present situation is any different in principle from what it was determined to be by the Supreme Court of the United States in 1962. Granting that the *Cafeteria Workers* case was decided by a five to four decision, it nevertheless still appears to stand as the law of the land and this Court feels it should be followed until and unless overruled by higher authority.

If the Court went into the facts of this case and so forth and didn't reach this conclusion, it could write for weeks concerning various ramifications of the problem presented, but to do so would be to do the very thing which this Court is holding it lacks power to do.

In passing, the Court might make the observation that it has been confronted with a situation which is not at all unique. The Court out of the blue was asked to issue a Temporary Restraining Order for the protection of three ministers and a group of military confinees. It was alleged that they were being deprived of Constitutionally guaranteed rights. All judges recognize this situation as being one which demands immediate consideration. The Court has made every reasonable effort to keep abreast of the trends enunciated by the courts, particularly in the area of individual Constitutional rights.

The Court has previously had problems dealing with conscientious objectors, in and out of the military, before it. When confronted with the particular requests presented by the three complainants herein, however, this Court did not have a firm or fixed resolution within fingertip grasp and evidentiary hearings were immediately undertaken so that, without delay, every aspect of the problem could be explored.

At the same time, with all the facilities available to it, the Court undertook to sort through the myriad of decisional material and the other pertinent periodical writings. The Court did not reach the conclusion, expressed just now until after this undertaking had been accomplished. Coincidental with this result came the end of the evidentiary hearings.

Now, having heard all of the evidence presented, it is exceedingly difficult for this Court to refrain from discussing the facts as the Court believes them to be, in the light and context of analogous decisions rendered by other courts. The Court, however, foregoes this temptation without apology to brother jurists who have succumbed to the temptation. The Court will not go into all the various ramifications; however, the Court will make this gratuitous comment that were this Court to hold otherwise than it did on the first basic issue, and were the Court to hold that it had the power to determine all of the questions raised, the Court believes that upon all of the facts before the Court, that the end result would not be different, notwithstanding the weaknesses in the testimony shown by the plaintiffs.

In this connection, I might say that there are some subsidiary issues to be ruled on, which of course the Court doesn't have to decide, but will decide, in case this action goes up on appeal, as I'm sure it will and I hope it does, because I'd like to see whether or not *Cafeteria Workers* versus *McElroy* means what it says. If it doesn't the Supreme Court ought to tell us so.

[2] First of all, I believe that the plaintiffs, notwithstanding the Government's position, had the necessary nexuses, as I believe at least one decision I have read says, to enable them to have standing to sue if this Court has

jurisdiction to hear this case. They are affected by the order and to that extent I believe that, although they are claiming incidentally or as part of their rights, the rights of people who wish to consult with them, I believe that the Courts would generally hold that there were sufficient nexuses established to give them standing to sue.

Inasmuch as this question is going to recur from time to time and there is still a continued situation in one of the cases where the claimed rights of at least one confinee are still not mooted, the Court believes that the withdrawing of the other plaintiffs would not deprive the Court of jurisdiction or moot the case, if it had jurisdiction.

The Court believes that the record will show other rulings made by the Court on evidence and other matter that don't need to be mentioned here, but I will close by saying that the Court's decision on the first and the major and controlling point is influenced, among other things, by the importance of the Naval Base here and the military bases here, particularly the Naval and Marine reservations, including the fact that we have a nuclear submarine base, we have various other essential parts of the effort to carry out what are still the policies of the nation regardless of what the opponents of the Vietnam war may say. It is still the national policy to prosecute the Vietnam action. The Admiral still has the duty to enforce that national policy; and the bases in the middle of the Pacific are in an extremely vulnerable position and are indispensable to the prosecution of that policy, and the Court feels that, under all of the circumstances disclosed by the whole record, the situation calls for the application of the doctrine this Court has above enunciated—that, in this particular type of case as shown by these particular circumstances with respect to these particular Naval reservations, the Court

should refrain from interfering with the determinations of the military and not try to tell the military what to do in these highly important administrative decisions.

Now, the reporter will please have this typed out and the Court will edit it as soon as possible and this will constitute the findings of fact and conclusions of law, unless further ones are asked.

I wish to expedite this matter because I am sure whichever parties are involved, if they are going to appeal, will want to appeal as soon as possible.

Notwithstanding the fine legal points so ably argued by extremely able counsel for the plaintiffs, the Court cannot find here, and does not find the existence of any conspiracy. Therefore, if the Court has the power to decide the matter of the existence or non-existence of a conspiracy, raised in two places in the complaint, the Court rules that conspiracy has not been established.

For the reasons above mentioned the remaining complaints in Civil Nos. 3078 and 3079 are hereby dismissed.

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Civil Action File No. 3078

REVEREND GENE BRIDGES, *et al.*

v.

ADMIRAL D. C. DAVIS, Commandant, Fourteenth Naval District, United States Navy, *et al:*

This action came on for trial (hearing) before the Court, HONORABLE C. NILS TAVARES, *United States District Judge,* presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that this case is dismissed for lack of jurisdiction.

Dated at Honolulu, Hawaii, this 22nd day of November, 1969.

WALTER A. Y. H. CHINN
Clerk of Court

By: (Signature Illegible)
Deputy Clerk

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Supreme Court, U.S.
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No. 71-712

In the Supreme Court of the United States

OCTOBER TERM, 1971

REVEREND GENE BRIDGES, ET AL., PETITIONERS

v.

ADMIRAL D. C. DAVIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 443 F. 2d 970. The opinion of the district court (Pet. App. 14a-25a) is reported at 311 F. Supp. 935.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1971. A timely petition for rehearing *en banc* was denied on August 27, 1971 (Pet. App. 10a-11a; 445 F. 2d 1401). The petition for a writ of certiorari was filed on November 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below properly declined to set aside an order issued by the commanding officer of a Naval Base, which excluded certain civilian ministers from entering the base in the interest of preserving military discipline and morale.

STATEMENT

Petitioners seek review of the dismissal of their action to enjoin enforcement of an order of the commanding officer of the Pearl Harbor Naval Base barring three clergymen from access to the base in the interest of preserving military morale, discipline and good order. The relevant facts are as follows:

1. On August 6, 1969, Rev. Robert Warner opened the doors of the Church of the Crossroads in Honolulu as a sanctuary to some servicemen who were absent without leave from their assigned military stations (Pet. App. 3a). Four days later, Rev. Warner and the AWOL servicemen led a group of approximately 350 people in a march under the name, the "Hawaii Resistance." During the march, Rev. Warner called on other servicemen to join the movement, and urged participants to "resist" any attempt by civilian or military authorities to arrest those who joined. Six additional servicemen entered the Crossroads Sanctuary (Pet. App. 3a). Rev. Warner then issued a statement that about 20 persons would barricade themselves in the sanctuary and protect the fugitive servicemen from arrest (Pet. App. 3a).

The military and civilian authorities refrained

from making any arrests of servicemen at that time. Thereafter, other servicemen entered the sanctuary; on August 17, when the number of servicemen in the sanctuary reached 15, Rev. Warner published an article which stated that those entering the church after the August 10 march "openly defied arrest" (Pet. App. 3a).

By August 22, the number of AWOL servicemen in the Crossroads Church had reached 24 (Pet. App. 3a–4a); three of them were moved to the First Unitarian Church of Honolulu, whose minister, Rev. Bridges, had opened his church as a sanctuary (Pet. App. 4a). Rev. Bridges, who also is an attorney, prepared a document to be signed by those who might be apprehended, which indicated that Rev. Bridges, or some other minister whom he might designate, should have immediate and prompt access to the fugitives in any place where they might be confined (Pet. App. 4a).[1]

In early September, 1969, the military authorities entered the churches and arrested twelve of the AWOL personnel; thirteen others escaped (Pet. App. 4a). Following the arrests, Rev. Warner conducted a service for about nine prisoners in the prison brig. Although he knew that the consumption of wine there was forbidden, Warner permitted a full bottle of wine to be passed among the prisoners, each of whom drank from it (Pet. App. 4a).

Immediately following this service, Admiral Davis, the Commanding Officer of the base, concluded that

[1] A third minister, Reverend Larry Jones, was also actively involved in the Crossroads Sanctuary activity (Pet. App. 5a).

Rev. Warner's overall conduct, both on and off the base, was detrimental to the good order and discipline of the service and decided to bar him from the base. However, before Admiral Davis took that action, he was dissuaded through the intercession of Rev. Bridges who promised to accept "certain areas of responsibility." Bridges, by letter, asked that he be permitted to give religious counselling and conduct services for prisoners and indicated that Rev. Warner and Rev. Jones would be acting under his supervision.

On September 25, 1969, Rev. Bridges held a service in the prison chapel for six prisoners. Although he had been informed of the military authorities' concern with Rev. Warner's lack of ministerial attire when on the base, Rev. Bridges conducted the service in a short-sleeved shirt and trousers. He also smoked, and permitted the prisoners to do likewise, although smoking is not permitted in the prison chapel (Pet. App. 4a–5a).

One soldier who escorted the prisoners to the chapel was so upset by the service that he told his commanding officers he would disobey an order to perform church duties again if the services involved these prisoners; another reacted to reports of the service by assaulting one of the participants. Admiral Davis testified that many such reports reached him, indicating that the service had a disturbing effect on the entire military community. Concluding that the continued presence on the base of the three ministers would have an adverse effect on the morale at the

base, he issued the order barring the three ministers from the base (Pet. App. 5a–6a).

2. The three ministers—Reverends Bridges, Jones and Warner—and several military prisoners brought this action in the district court seeking injunctive relief. After a full trial, the district court, relying on *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, dismissed the complaint (Pet. App. 26a). The Ninth Circuit affirmed (Pet. App. 13a), and denied a petition for rehearing *en banc* (Pet. App. 10a–11a).

ARGUMENT

1. The court of appeals correctly held that this case is governed by *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886. There the commanding officer barred the plaintiff from a military base for failing to meet security requirements, without affording her a hearing prior to issuing the order. The plaintiff claimed that the order violated her right to due process of law under the Fifth Amendment. Noting a base commander's "historically unquestioned power * * * summarily to exclude civilians from the area of his command", 367 U.S. at 893, this Court rejected the argument (367 U.S. 898):

> We may assume that [plaintiff] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled

> to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational * * *.[2]

To permit the courts to reevaluate a base commander's decision that exclusion of particular civilians from the base is necessary to preserve military morale and discipline would involve the judiciary in an area which it is ill-equipped to enter and which necessarily must be largely committed to the discretion of the military authorities. As this Court pointed out in *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94, " * * * judges are not given the task of running the Army. * * * The military constitutes a specialized community governed by a separate discipline from that of the civilian." The fact that the civilians excluded from the military post in this case are ministers of religion does not lessen the post commander's authority to exclude them. He may exclude civilians whose presence causes serious problems for the military, whatever their calling.

2. The base commander had adequate reasons for barring these three ministers from the base. He did so because he concluded that their continued presence would have a detrimental impact on military morale and discipline (Pet. App. 5a). Applicable regulations require a base commander to "promote and safe-

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[2] In the court of appeals, both the majority and Judge Koelsch concluded that a commander's bar order is subject only to an extremely limited scope of review (Pet. App. 7a, 9a). The only disagreement between the majority and Judge Koelsch involved the application of this settled legal principle to the facts of this individual case—and even then with regard only to one of the ministers concerned.

guard the morale" of the men under his command, and "[e]xert every effort to maintain his command in a state of maximum effectiveness for war service". Navy Regulations, §§ 07020A, 0709.1; Pet. 3. See *Cafeteria Workers, supra.* The ministers' activity in providing sanctuary for AWOL personnel and the disruptive effect of their activities on the base provided ample grounds for Admiral Davis' conclusion that their continued presence would have a detrimental impact on military morale and discipline.

3. There is no conflict among the circuits and, contrary to petitioners' assertion (Pet. 11), there is no "confusion and disarray" regarding the standards for judging the validity of military orders barring from bases civilians who assert the infringement of First Amendment rights. The decisions of all the courts of appeals which have considered the question are in harmony with the opinion below. *Weissman* v. *United States,* 387 F. 2d 271 (C.A. 10); *United States* v. *Cassiagnol,* 420 F. 2d 868, 874 (C.A. 4), certiorari denied, 397 U.S. 1044; *Holdridge* v. *United States,* 282 F. 2d 302, 311 (C.A. 8). See *Government of Canal Zone* v. *Brooks,* 427 F. 2d 346, 347 (C.A. 5); *United States* v. *Jelinski,* 411 F. 2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Dash* v. *Commanding General,* 307 F. Supp. 849, 856 (D.S.C.), affirmed on opinion below, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. Cf. *Koehl* v. *Resor,* 296 F. Supp. 558, 562 (E.D. Va.), affirmed on opinion below, 417 F. 2d 1338 (C.A. 4), certiorari denied, 397 U.S. 1023.

As the court of appeals pointed out in denying the petition for rehearing *en banc* in the present case,

Kiiskila v. *Nichols*, 433 F. 2d 745 (C.A. 7), upon which petitioners rely, is not to the contrary. The issue in *Kiiskila* was whether "an employee of the government" could be "deprived of his employment" merely because he exercised his "right to engage in criticism of governmental policy", 433 F. 2d at 749. The Seventh Circuit noted that it "need not decide whether a civilian not employed on the base could be excluded for the reasons present in this case." 433 F. 2d at 748 n. 4. This case does not involve a discharge from public employment and, in striking contrast to *Kiiskila*, it does not involve a peaceful and legitimate attempt to express views critical of the Vietnam War or the government.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972